A

Raja Lob Sharuddin bin Raja Ahmad Terzali & Ors v Sri Seltra Sendirian Bhd

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–791 OF 2005
GOPAL SRI RAM, AZMEL AND MOHD NOR ABDULLAH JJCA
14 MARCH 2007

C

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D

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I

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The 45 plaintiffs herein claimed that their houses bought from the defendant were not built according to specifications and/or suffered from poor workmanship. They thus sued the defendant. The plaintiffs led evidence of such defects mainly through PW1 — an experienced engineer of 25 years' standing and registered with the Lembaga Jurutera Malaysia. PW 1 — engaged by the plaintiffs had prepared a report detailing the defects. He also took photographs of those defects. His evidence was that the defects to the houses, which were all similar in nature, were serious structural defects which would not appear immediately. PW1's report and the photographs were put into the 'Ikatan dokumen bundle B' (bundle of documents bundle B). Witnesses for the defence testified to the effect that the defendant had obtained all the required planning and development approvals from the relevant government agencies and had also engaged professional consultants. It was denied on behalf of the defendant that low quality materials were used, but no explanation was offered with regard to the defects in the houses of the plaintiffs. The defendant failed to adduce any professional evidence to dispute PW1's engineering report. The defendant in fact attacked the credibility of PW1's report and questioned the photographs produced on the ground that the negatives were not produced by PW1. The defendant alleged that the defects in the plaintiffs' houses appeared well after the defects liability period and therefore the plaintiffs had no cause of action against the defendant. At first instance, the High Court judge agreed with the defendant that PW1's testimony lacked credibility. The High Court judge doubted PW1's report on the basis that it did not bear any date, name of maker nor identify the scope of the investigation. He also found the photographs doubtful as inter alia the negatives were not produced. The judge thus ruled that the plaintiffs had

failed to prove their case and dismissed their claims with costs. Prior to delivering judgment, the judge had, at the commencement of the hearing struck out the claims of 12 plaintiffs on the basis that they were not present in court — this notwithstanding the fact that the 45 plaintiffs were all represented by the same counsel who was obviously present in court. The plaintiff appealed to the Court of Appeal.

Held, allowing the appeal with costs:

(1) The decision of the High Court judge to strike out the claims of the 12 plaintiffs was not proper. In a civil action counsel may appear on behalf of a plaintiff without the need of that plaintiff being present in court, unless of course the plaintiff was to give evidence. On record Mr Rajadevan appeared on behalf of all the plaintiffs including the 12 absent plaintiffs. It was therefore wrong in law to strike out the 12 plaintiffs' actions when their counsel was present in court. The decision of the judge on this part ought to be reversed and the affected plaintiffs be given liberty to file afresh (see para 4).

(2) An appellate court has a duty to intervene where a trial court has so fundamentally misdirected itself, that no reasonable court which had properly directed itself and asked the correct questions, would have arrived at the same conclusion (lihat perenggan 19); *Sivalingam a/l Periasamy v Periasamv & Anor* [1995] 3 MLJ 395 referred.

(3) The High Court judge erred in finding that PW1's evidence lacked credibility. Given that PW1 personally prepared the report, gave evidence in court and personally tendered the report, there was no good reason why the report should be rejected merely because it had no date, name of maker and failed to state the scope of PW1's investigation. These details had been given by PW1 personally in his (oral) evidence. To reject PW1's report merely on those reasons would be unjust, unfair and completely misconceived. Furthermore, the report was included in the bundle of documents part B. A document included in bundle B means both parties to an action had, prior to the commencement of the hearing, agreed to the production and regularity of such document. In such a situation, what remained to be argued should be confined to the contents only and not to the form. The judge had therefore misdirected himself when he refused to consider PW1's report (see paras 20–21).

(4) Similarly, the photographs had been placed in the bundle of documents part B. It is a well accepted practice in the Civil Division of the High Court in Kuala Lumpur that the bundle of documents part B categorise documents that both parties have, before the commencement of hearing, agreed to production without the need to call the makers

thereof. In the light of such practice it is not open to either party to question the origins of documents placed therein. In the instant case, since the parties had agreed to produce the photographs under bundle of documents part B, the need to produce the negatives was completely unnecessary. The High Court judge had therefore misdirected himself when he rejected the photographs (see para 22).

(5) The Court of Appeal could not agree with the trial judge's doubts concerning the photographs since: (i) mere suspicion should not and could not be regarded as a valid reason; (ii) the wrongful inclusion of one photograph could not be used to invalidate all the photographs produced; (iii) an apparent doubt on a certain part of a witness's testimony is not a ground to reject his entire evidence — for the trial judge to reject the evidence of PW1 entirely in reliance upon DW2's (defence witness) comments about the photographs was completely against the overwhelming weight of evidence adduced for the plaintiffs. In the light of PW1's credentials and experience and in the absence of any engineering report produced by the defendant, the trial judge had misdirected himself in rejecting PW1's report (see para 23).

(6) The trial judge's finding that PW1 did not give particulars of the plans and by-laws that the defendant had contravened, could not be supported having regard to the list of defects found by PW1 as stated in his report (see para 24).

(7) The defects liability clause as contained in cl 23 of the sale and purchase agreement is meant to be an additional statutory protection for house buyers, without affecting or limiting their rights under the common law. The reliance of the defect liability period as a defence by the defendant should be totally rejected (see paras 27–29); *City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd* [1988] 1 MLJ 69 and *Teh Khem On & Anor v Yeoh & Wu Development Sdn Bhd & Ors* [1995] 2 MLJ 663 followed.

Semble:

If a document is put in the bundle of documents part A — that is where the parties have agreed to its production and contents — no party will be allowed to ask any question at all on that documen (see para 22).

[Bahasa Malaysia summary

45 orang plaintif di sini menuntut bahawa rumah-rumah mereka yang dibeli daripada defendan tidak dibina menurut spesifikasi dan/atau dibina dengan buatan yang kurang berkualiti. Mereka oleh itu telah menyaman defendan. Plaintif-plaintif telah mengemukakan keterangan berhubung kecacatan tersebut terutamanya melalui PW1 — seorang jurutera yang berpengalaman

selama 25 tahun dan berdaftar dengan Lembaga Jurutera Malaysia. PW 1 — yang telah dilantik oleh plaintif-plaintif telah menyediakan laporan memperincikan kecacatan tersebut. Beliau juga telah mengambil gambar kecacatan tersebut. Keterangannya adalah bahawa kecacatan kepada rumah-rumah tersebut, yang semuanya sama, merupakan kecacatan penstrukturan yang serius yang tidak kelihatan dengan segera. Laporan dan gambar-gambar PW1 telah dimasukkan dalam ikatan dokumen B. Saksi-saksi untuk pihak pembelaan memberi keterangan bahawa defendan telah memperoleh semua kelulusan perancangan dan pembangunan daripada agensi kerajaan berkaitan dan juga telah melantik perunding-perunding profesional. Ia dinafikan di pihak defendan bahawa bahan-bahan berkualiti rendah telah digunakan, tetapi tiada penjelasan telah diberikan berhubung kecacatan-kecacatan kepada rumah-rumah plaintif-plaintif. Defendan telah gagal untuk mengemukakan apa-apa keterangan profesional untuk mempertikaikan laporan kejuruteraan PW1. Defendan sebenarnya telah menyerang kebolehpercayaan laporan PW1 dan mempersoalkan gambar-gambar yang dikemukakan atas alasan bahawa negatif-negatif itu tidak dihasilkan oleh PW1. Defendan mendakwa bahawa kecacatan-kecacatan dalam rumah-rumah plaintif-plaintif kelihatan elok selepas tempoh liabiliti kecacatan dan oleh itu plaintif-plaintif tiada kausa tindakan terhadap defendan. Pada mulanya, hakim Mahkamah Tinggi telah bersetuju dengan defendan bahawa testimoni PW1 tidak boleh dipercayai. Hakim Mahkamah Tinggi meragui laporan PW1 berdasarkan yang ia tidak mempunyai tarikh, nama pembuat mahupun identiti skop siasatan. Beliau juga mendapati gambar-gambar tersebut meragukan kerana antara lain negatif-negatif tersebut tidak dihasilkan. Hakim oleh itu memutuskan bahawa plaintif-plaintif telah gagal untuk membuktikan kes mereka dan menolak tuntutan-tuntutan mereka dengan kos. Sebelum menyampaikan penghakiman, hakim telah, pada permulaan perbicaraan membatalkan tuntutan-tuntutan 12 plaintif-plaintif atas dasar yang mereka tidak hadir di mahkamah — ini meskipun hakikatnya yang 45 plaintif-plaintif tersebut telah kesemuanya diwakili oleh peguam yang sama yang jelas hadir di mahkamah. Plaintif telah merayu ke Mahkamah Rayuan.

Diputuskan, membenarkan rayuan dengan kos:

(1) Keputusan hakim Mahkamah Tinggi untuk membatalkan tuntutan-tuntutan 12 plaintif-plaintif tidak teratur. Dalam satu tindakan sivil peguam boleh hadir bagi pihak plaintif tanpa perlunya plaintif itu hadir sama di mahkamah, kecuali jika plaintif memberikan keterangan. Atas rekod, Mr Rajadevan hadir bagi pihak kesemua plaintif-plaintif termasuklah 12 plaintif-plaintif yang tidak hadir. Ia adalah salah dari segi undang-undang untuk membatalkan tindakan-tindakan 12 plaintif-plaintif tersebut apabila peguam mereka

hadir di mahkamah. Keputusan hakim berhubung perkara ini patut dimansuhkan dan plaintif-plaintif yang terlibat patut diberikan kebebasan untuk memfailkan semula rayuan mereka (lihat perenggan 4).

(2) Suatu mahkamah rayuan mempunyai tanggungjawab untuk campur tangan di mana mahkamah perbicaraan telah salah arah, di mana tiada mahkamah yang munasabah yang telah mengarahkan sewajarnya dan bertanyakan soalan yang sewajarnya, tiba kepada kesimpulan yang sama (lihat perenggan 19); *Sivalingam a/l Periasamy v Periasamv & Anor* [1995] 3 MLJ 395 dirujuk.

(3) Hakim Mahkamah Tinggi terkhilaf dalam penemuan yang keterangan PW1 tidak boleh dipercayai. Berdasarkan bahawa PW1 sendiri yang telah menyediakan laporan tersebut, memberikan keterangan di mahkamah dan secara peribadi menender laporan itu, tidak ada alasan baik kenapa laporan itu patut ditolak hanya kerana ia tiada tarikh, nama pembuat dan gagal untuk menyatakan skop siasatan PW1. Butir-butir tersebut telahpun diberikan secara peribadi oleh PW1 dalam keterangannya (lisan). Untuk menolak laporan PW1 hanya disebabkan alasan-alasan tersebut adalah tidak adil dan disalah tanggap. Bahkan, laporan itu telah dimasukkan dalam ikatan dokumen bahagian B. Suatu dokumen termasuklah dalam ikatan B bermaksud kedua-dua pihak kepada suatu tindakan telah, sebelum perbicaraan bermula, bersetuju dengan penghasilan dan ketetapan dokumen. Dalam keadaan sedemikian, apa yang tinggal untuk dihujahkan hendaklah terhad kepada kandungan itu sahaja dan bukan borang iru, Hakim itu oleh demikian telah salah arah apabila beliau enggan mempertimbangkan laporan PW1 (lihat perenggan 20–21).

(4) Begitu juga, gambar-gambar tersebut telahpun dimasukkan dalam ikatan dokumen bahagian B. Ia adalah amalan yang diterima baik dalam Bahagian Sivil Mahkamah Tinggi di Kuala Lumpur bahawa ikatan dokumen bahagian B mengkategorikan dokumen-dokumen yang kedua-dua pihak miliki, sebelum mulanya perbicaraan, bersetuju untuk dihasilkan tanpa perlu memanggil pembuatnya. Berdasarkan amalan sedemikian ia tidaklah terbuka untuk mana-man pihak menyoal tentang asal dokumen-dokumen yang dimasukkan dalam ikatan tersebut. Dalam kes semasa, memandangkan pihak-pihak telah bersetuju untuk mengemukakan gambar-gambar di bawah ikatan dokumen bahagian B itu, keperluan untuk menghasilkan negatif-negatif tersebut sememangnya tidak perlu. Hakim Mahkamah Tinggi oleh itu telah salah arah apabila menolak gambar-gambar tersebut (lihat perenggan 22).

(5) Mahkamah Rayuan tidak bersetuju dengan keraguan hakim perbicaraan berkaitan gambar-gambar tersebut memandangkan: (i) syak

wasangka sahaja tidak patut dan tidak boleh dianggap sebagai alasan yang sah; (ii) kemasukan yang salah satu gambar tidak boleh digunakan untuk menjadikan penghasilan kesemua gambar itu tidak sah; (iii) keraguan nyata pada sebahagian tertentu testimoni saksi bukan alasan untuk menolak keseluruhan keterangannya — untuk hakim perbicaraan menolak keterangan PW1 secara keseluruhannya bergantung kepada komen DW2 (saksi pihak pembelaan) tentang gambar-gambar bercanggah dengan beban keterangan yang dikemukakan untuk plaintif-plaintif. Berdasarkan bukti kelayakan dan pengalaman PW1 dan dengan ketiadaan apa-apa laporan kejuruteraan dihasilkan oleh defendan, hakim perbicaraan telah salah arah dalam menolak laporan PW1 (lihat perenggan 23).

(6) Penemuan hakim perbicaraan bahawa PW1 tidak memberikan butir-butir pelan-pelan dan undang-undang kecil bahawa defendan telah langgari, tidak boleh disokong berdasarkan senarai kerosakan yang didapati oleh PW1 seperti yang dinyatakan dalam laporannya (lihat perenggan 24).

(7) Fasal liabiliti kerosakan seperti yang terkandung dalam fasal 23 perjanjian jualbeli dianggap sebagai perlindungan statutori untuk pembeli rumah, tanpa menjejaskan atau membatas hak-hak mereka di bawah common law. Kebergantungan kepada tempoh liabiliti kerosakan sebagai satu pembelaan oleh defendan patut ditolak sama sekali (lihat perenggan 27–29); *City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd* [1988] 1 MLJ 69 dan *Teh Khem On & Anor v Yeoh & Wu Development Sdn Bhd & Ors* [1995] 2 MLJ 663 diikut.

Semble:

Jika suatu dokumen dimasukkan ke dalam ikatan dokumen bahagian A — di mana pihak-pihak bersetuju tentang penghasilan dan kandungannya — tiada pihak dibenarkan bertanyakan apa-apa persoalan langsung berhubung dokumen tersebut (lihat perenggan 22).]

Notes

For a case on defect liability clause, see 8(2) *Mallal's Digest* (4th Ed, 2006 Reissue) para 2855.

For cases on absence of plaintiff generally, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1–5.

For cases on bundle of documents generally, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2565–2587.

For cases on commencement of action, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 62–76.

For cases on construction of terms, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 5251–5295.

For cases on credibility of witness, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2673–2705.
For cases on interference by appellate court, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1042–1065.
For cases on striking out of action, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6655–6693.

Cases referred to

City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd [1988] 1 MLJ 69 (folld)
Sivalingam a/l Periasamy v Periasamv & Anor [1995] 3 MLJ 395 (refd)
Teh Khem On & Anor v Yeoh & Wu Development Sdn Bhd & Ors [1995] 2 MLJ 663 (folld)

Legislation referred to

Housing Developers (Control and Licensing) Act 1966
Housing Developers (Contract and Licensing) Regulations 1982 reg 12(1), Schedule E
Uniform Building By-Law (Act 138)

Appeal from: Suit No S1–22–228 of 1992 High Court, Kuala Lumpur)

Rajadevan (Rajadevan & Associates) for the appellants.
N Selvam (N Selvam & Co) for the respondent.

Azmel JCA (now FCJ, deliveirng judgment of the court):

[1] The appellant/plaintiffs, each of whom were the purchasers of 45 double-storey terrace houses from the respondent/defendant brought action against the defendant claiming that the houses they purchased were not built according to specifications, the quality of the materials used was poor and the workmanship was of a low standard. The learned High Court judge dismissed their claim. On appeal to this court we unanimously allowed their appeal. We now state our grounds.

FACTS OF THE CASE

[2] The plaintiffs purchased from the defendant double storey terrace houses in Taman Nirwana Fasa 2, Ampang, Selangor. Vacant possession of those houses were delivered to the plaintiffs sometime in early 1987. Subsequent to the delivery the plaintiffs complained against the defendant that their houses were not built according to specifications, the quality of materials used was poor and the workmanship was of a low standard.

In support of their contention, the plaintiffs engaged an engineer, (PW1) who prepared a report detailing the defects found by him on those 45 houses. PW1 also produced photographs showing the nature of those defects. In his evidence PW1 stated the costs to make good those defects would be in the region between RM14,000 and RM20,000. In the statement of claim, however, the plaintiffs claim a sum of not more than RM25.000.

DECISION OF JUDGE AT COMMENCEMENT OF HEARING

[3] At the commencement of hearing 12 plaintiffs who were the owners of 12 houses were not present in court. There were plaintiffs No 3, 6, 11, 13, 17, 20, 23, 28, 33, 37, 41 and 44. Because of their absence the learned judge struck off their actions.

[4] In our view the decision of the learned judge was not proper. In a civil action a counsel may appear on behalf of a plaintiff without the need of that plaintiffs to be present in court. On record Mr Rajadevan appeared on behalf of all the plaintiffs including the 12 absent plaintiffs. It is therefore wrong in law to strike out the plaintiffs' actions when their counsel was present in court. The presence of a plaintiff is not essential in a civil action. So long as someone is present in court on his behalf it would not be lawful for the court to strike out the plaintiff's action. His presence would become necessary if he is required to give evidence. In a civil action it is not uncommon where other persons give evidence on behalf of the plaintiff without the plaintiff himself giving evidence. In the light of very clear misdirection made by the learned judge in striking out the actions of the said 12 plaintiffs on the ground of their absence we therefore ruled that part of decision of the learned judge be reversed and the affected plaintiffs are at liberty to file afresh.

HEARING IN RESPECT OF REMAINING PLAINTIFFS

[5] The proceedings in respect of the remaining plaintiffs proceeded with two witnesses being called on behalf of the plaintiffs. The 1st witness, Hj Ahmad Kamal Kunji (PW1), a professional civil engineer registered with Lembaga Jurutera Malaysia with 25 years experience behind him testified that he was appointed by the plaintiffs to do an inspection regarding the defects of construction found in their respective 45 houses. So an inspection of all the parts of the 45 houses was carried out by PW1 himself. This was done sometime in November 1987. However he only completed writing his engineering report early 1998 which was produced in ikatan dokumen bundle B (encl 53). As regards of the basis of his investigation, PW1 said:

> Asas-asas kajian adalah berdasarkan pembinaan yang telah dibuat berbanding dengan pelan-pelan lukisan pihak pemaju iaitu lukisan akitek, lukisan jurutera, spesifikasi kontrak diantara pemaju dan pemborong, Uniform Building By Law

Akta 138 dan Amalan Baik Pembinaan (Sound Construction Practice). Saya juga telah melantik firma Perunding yang boleh membuat kajian lantai iaitu Malaysian Soil Investigation telah menjalankan pemeriksaan pada 27 Mac 1998 dan telah memajukan laporan kajian

[6] A soil investigation report was produced in ikatan dokumen bundle B (encl 56). Photographs were also taken by PW1 during his inspection of the houses and these were produced in ikatan dokumen bundle B (encls 54 and 55).

[7] PW1 identified 10 types of detects tound in the plaintiff's houses:

(i) Pembinaan rumah tidak menepati pelan yang disediakan — contohnya ukuran beza paras lantai di antara bilik master dengan lantai bilik air sepatutnya minima 2 inci tetapi pembinaannya tidakpun sampai 0.5 inci. Fungsi beza paras adalah supaya air tidak melempah ke ruang bilik tidur semasa bilik mandi gunakan;

(ii) Pembinaan rumah tidak dilaksanakan dengan betul dimana terdapat keretakan yang serius kerana keretakan dibeberapa tempat didinding menembusi dari lapisan atas hingga bawah;

(iii) Ketebalan lantai tidak menepati spesifikasi amalan dimana ketebalan driveway konkrit 60mm berbanding dengan amalan biasa 100mm dan kualiti hardcore iaitu batu pelapik tidak menepati spesifikasi iaitu kandungan tanah pasir melebihi komposisi batu;

(iv) Teknik susun atur kerja pembinaan lantai dibahagian lantai tidak betul kerana terdapat lapisan pemisah pasir diantara konkrit, yang membawa erti mosaic berasaskan lapisan tidak kukuh;

(v) Kualiti workmanship terialu rendah dimana pembinaan dinding senget dan kerja plastering terialu kasar menyebabkan permukaan didinding berombak

(vi) Kerja-kerja mengecat besi tidak diamalkan dengan betul menyebab-kan premature corrosion dimana karatan tidak sepatutnya timbul didalam tempoh lima tahun yang pertama;

(vii) Pembinaan dinding pemisah tidak menepati Uniform By - Law dimana ketebalannya sepatutnya 9 inci dan pembinaan yang sedia ada 41A inci dan terdapat lubang didalam siling diantara kedua rumah, kelemahan ini didalam siling diantara kedua rumah, kelemahan ini tidak mencapai ciri-ciri keselamatan semasa kebakaran;

(viii) Pembinaan lantai tidak dilaksanakan dengan betul dimana terdapat serapan air dari lantai bilik air atas yang dilihat dari tingkat bawah;

(ix) Applikasi cat kayu pada siling tidak menepati spesifikasi dimana cat yang digunakan sepatutnya cat yang berasaskan minyak tetapi cat yang berasaskan air telah digunakan; dan

(x) Dinding seramik tidak dial as dengan simen sepenuhnya menimbulkan implikasi kepingan seramik mudah pecah kalau terhentak.

[8] In PW1's view those defects were serious defects and they were structural defects to the houses. PW1 also said such defects were the type that would only become apparent at a late stage. Such defects would not appear immediately. PW1 further said that the defects of the 45 houses were almost similar to one another, with minor variations.

[9] The other witness called for the plaintiffs was Raja Lob Sharuddin (PW2). He is the 1st plaintiff in this action. In his evidence PW2 said that he was given vacant possession of his house by the defendant in early 1987. After staying in the house for some time he found a number of defects had developed in the house. Originally he found water seeping through the walls in the upper and lower floors. He then verbally informed the defendant of the defect. But no action was taken by defendant. Sometime later more defects appeared. The only remedial work carried out by the defendant was to repaint the walls of the plaintiff's house. Not satisfied 'with the defendant's action, PW2 together with the other plaintiffs engaged the services of PW1 to make an inspection and prepare a report in respect of the defects that occurred on the 45 houses of the plaintiffs.

[10] The defendant as stated in the statement of defence put up defence of denial. Two witnesses were called to give evidence on behalf of the defendant. DW1, Foo Wan Hong, was the executive director of the defendant. The gist of what he said was that in carrying out the development at Taman Nirwana the defendant had obtained all the required planning and development approvals from the relevant government agencies and the defendant had also engaged professional consultants, like architect, quantity surveyor, civil and structural engineer, electrical engineer and the main contractor. As to the materials used the defendant followed the appropriate materials according to the advice given by the Architect. DW1 said no low quality materials were used.

[11] As to the appointment of the main contractor DW1 said that their emphasis was based mainly on experience, good name of the candidate in the construction industry as well as perusing their work records. On the basis of the above qualification defendant engaged Kenco Construction Sdn Bhd as their main contractor. As regards the defects found on the 45 houses of the plaintiffs, DW1 did not say anything at all.

[12] The other defence witness, Yeow Ah Kow (DW2), was the site agent of the main contractor, Kenco Construction Sdn. Bhd. His main function was to oversee the whole construction from beginning until completion. Kenco Construction was involved as the main contractor with the construction of Taman Nirwana from Phase I since 1975 for the housing development projects carried out by the defendant. His evidence centred mainly on how the construction of the housing project were carried out.

[13] As regards the photographs produced in encls 54 and 55 of ikatan dokumen bundle B, DW2 said the photographs were taken after many years had elapsed since vacant possession was given. The defects could not be there during the defects liability period. In his testimony DW2 did not say that he had inspected the plaintiffs houses to verify the defects alleged.

[14] We have noted that the defendant did not call any professional engineer to give evidence to dispute the engineering report produced by PW1 as regards the defects found on the plaintiffs' houses.

PLAINTIFFS' CONTENTION

[15] The plaintiffs contended that the testimony of PW1 was very clear as to the existence of defects to the plaintiffs' houses. The defendant failed to cross-examine PW1 as regards the defects. As such the evidence of PW1 should be taken as undisputed fact by the court: Furthermore the evidence of PW1 was supported by the evidence of PW2. In addition to that PW1 had produced a report of the defects found on the 45 houses and had also taken photographs of the defects at the time when he made his inspection of the houses in November 1987. The period of eligibility of the plaintiffs to make claim against the defendant is not confined to the defects liability period only. Under common law the plaintiffs are entitled to bring action even after the defect liability period had expired.

DEFENDANT'S CONTENTION

[16] The defendant questioned the credibility of PW1 and the report he produced as it contained so many weaknesses. The defendant also questioned the photographs produced on the ground that the negatives were not produced by PW1. The defendant alleged that the plaintiffs had no proof that the report was prepared in November 1987. The defendant alleged that the defects appeared well after the detects liability period and therefore the plaintiffs had no cause of action against the defendant.

A FINDINGS OF THE HIGH COURT

[17] The learned judge agreed with the defendant that PW1's testimony lacked credibility. His findings were based on the followings:

B (a) PWTs report in encl 53 was doubtful. The report did not bear any date, name of maker nor the scope of his investigation.

(b) The accompanying photographs in encls 54 and 55 were without negatives

C (c) The photographs taken were in doubt:

(i) There were three sets of photographs taken by PW1 at different periods when he was conducting the inspection of the houses. Strong suspicions were cast on whether some of them were included to improve the plaintiffs' claim rather than a reflection of the actual situation when the examination of the houses was undertaken in 1987;

D

(ii) One of the photographs shows a newspaper advertisement spread on the floor in one of the houses with the words 'Kongsi Raya'printed across. This celebration could only have occurred in this country commencing from 1996 to 1999;

E

(iii) Any doubt relating to the time taken when they were taken naturally reflects on the authenticity of the plaintiffs' claim;

F (iv) The photographs show their premises were well lived in. On many parts of the wall and drains there were fungus and stains which could only be brought after a substantial period of time.

(d) PW1 had stated that some of the defects highlighted were due to the defendant not complying with plans and By-laws when constructing the houses. But which particular plans and By-laws contravened were not brought to the attention of the court for verification during trial.

G

RULING OF THE HIGH COURT

H

[18] The learned judge ruled that the plaintiffs have failed to prove their case. As such he dismissed the plaintiffs' claims with costs.

FINDING OF THIS COURT

I

[19] It is trite law that an appellate court will not readily interfere with the findings of facts arrived at the trial court to which the law entrusts the primary task of evaluation of the evidence. However, the appellate court has a duty to intervene where a trial court has so fundamentally misdirected itself,

that one may say that no reasonable court which had properly directed itself and, asked the correct questions would have arrived at the same conclusion. See *Sivalingam a/l Periasamy v Periasamv & Anor* [1995] 3 MLJ 395.

[20] It is true that in this case the success of the plaintiffs' claim hinges very much on the acceptability of the report made by PW1, the engineer. The learned judge found PW1's testimony to be lacking in credibility and gave five main reasons for arriving at that conclusion. We are unable to agree with the learned judge in his ruling that PW1's evidence lacked credibility.

[21] We first of all, deal with the allegation that PW1's report did not bear any date, name of maker nor the scope of his investigation. At the outset, it must be remembered that PW1 himself gave evidence in court. He himself tendered his report and confirmed its content. He also confirmed that he himself inspected the 45 houses in November 1987 and prepared the written report in early 1988. That PW1 by himself alone prepared the report without the involvement of any other person, and he himself gave evidence in court and himself tendered the report we fail to find any good reason why the report should be rejected merely because it had no date, name of maker and scope of his investigation. There should not be any mystery whatsoever as to the name, date or scope of his investigation since all these particulars had been given by PW1 himself in his evidence. Such reasons may be valid if PW1 were to tender a report prepared by someone else and he had no knowledge of it. But this is PW1's own report prepared solely by him without the assistance of anybody else. To reject such report merely on those reasons would be unjust, unfair and completely misconceived. Furthermore, the report was included in bundle of document B. A document included in bundle B means both parties to this action had, prior to the commencement of the hearing, agreed to the production and regularity of such document. What remain to be argued should We the confined to the content only and not to the form. We therefore feel that the learned judge had misdirected himself when he refused to give any consideration to PW1's report in encl 53.

[22] Secondly, the learned judge rejected the photographs in encls 54 and 55 because the negatives were not produced in court. Here again the learned judge had misdirected himself. Just like the engineering report the photographs were documents produced in bundle of document B in Enclosures 54 and 55. It is a well accepted practice in the Civil Division of the High Court in Kuala Lumpur that bundle of documents B are categories of documents where both parties have, before the commencement of hearing, agreed to its production without the need to call the maker. In the light of such agreement it would no longer be open to either party to question the origin of that document. Since the photographs had been agreed by both parties to be produced under bundle of document B the need to produce the

negatives would be completely unnecessary. Otherwise it would defeat the purpose of categorising the documents in bundle B. And if a document is put in bundle A, where the parties have agreed to its production and content, no party would be allowed to ask any question at all on that document. In the circumstances we ruled that the learned judge had misdirected himself when he rejected the photographs.

[23] As to the third ground, we find ourselves in total disagreement with ruling of the learned judge. Our reasons are as follows:

(i) It is trite that mere suspicion should not and could not be regarded as a valid reason;

(ii) Wrongful inclusion of one photograph cannot be used to invalidate the entire photographs produced. It is for the judge to clearly identify those photographs which he satisfactorily found to be wrongful or not relevant;

(iii) It is trite law that no witness giving evidence would appear to give 100% truth. And if that should happen then the likelihood of such evidence being concocted would be very probable. It is also trite that an apparent doubt on certain part of a witness's testimony would not be a ground to reject his entire evidence; It would appear as very obvious that the learned judge relied completely on what the defendant alleged to be the condition of the houses based entirely on their assessment of the photographs produced in court. No inspection had been done by any of the defendant witnesses. On the other hand PW1, an engineer, had inspected all the 45 houses before preparing his engineering report and had taken the photographs of the defects. PW1's evidence had been supported by the evidence of PW2. For the learned judge to decide in favour of the defendant relying entirely on PW2's comment on the photographs produced would be completely against the overwhelming weight of evidence adduced for the plaintiffs and as such we find it very difficult to accept. Short of making actual inspection of the defects to the houses it would be highly unconceivable how any could make a conclusion that a report on defects based on full inspection could be rejected by the court. What the defendant should have done was to call a witness with engineering qualification to inspect the plaintiffs' houses and produce a report disputing PW1's report on the defects. In such a situation the learned judge would be in a better situation which report to accept. In the circumstances of this case we could not find any reason why PW1's report should be rejected. It is in evidence that PW1 was a qualified civil engineer, registered with Lembaga Jurutera Malaysia and had 25 years experience as an engineer specialising in the field of engineering consultancy on building matter. With such credentials and

in the absence of any engineering report produced by the defendant the learned judge had misdirected himself when he rejected the report of PW1

[24] In respect of the fourth ground, the learned judge found that PW1 (the engineer) did not give particulars of the plans and by-laws that the defendant had contravened. This is where we felt the learned judge had completely overlooked the written statement of PW1. In his answer to Question No 12, PW1 did state that he based his report on 'the Uniform Building By-Laws Akta 138 and Amalan Baik Pembinaan (Sound Construction Practice)'. In addition to the above PW1 had also made comparisons of the works constructed on the houses with drawing plans, prepared by the architect, engineer and the specifications as mentioned in the contract between the plaintiffs and the defendant. As can be seen in the list of 10 defects as found by PW1 on the plaintiffs' houses PW1 had made use of the above said comparison e.g. defect No 7 the thickness of the wall separating the houses in conformity with the Uniform Building By-Law Act 138 is 9 inches whereas the defendant only constructed a 414 inch separation wall and the measurement between the floor level of a master bedroom and that of the bathroom according to the plan should be 2 inches whereas the defendant only constructed less than 0.5 inch difference (Defect No 1).

[25] Having regard to the list of 10 defects found by PW1 as stated earlier in this judgment we are unable to support the finding of the learned judge on this issue.

DEFECT LIABILITY PERIOD

[26] The defendant strenuously contended that the plaintiffs' action should fail because the defects were discovered after the expiry of the defects liability period. The learned judge had also accepted this as a strong ground to reject the plaintiffs' claim. The defect liability clause is contained under cl 23 of the sale and purchase agreement which reads:

23. Any defect, shrinkage or other faults in the building which shall become apparent within a period of twelve (12)

of vacant possession to the Purchaser and which are due to defective workmanship or materials or the said Building not having been constructed in accordance with the said specifications and plans as approved by the Appropriate Authority (amended for unamended as the case may be) shall be repaired and made good by the Vendor at his own cost and expense within one month of its having received written notice thereof from the Purchaser and if the said defects, shrinkage or other faults in the Building have not been made good by the Vendor, the Purchaser shall be entitled to recover from the Vendor the costs of making good the same and the

A Purchaser may deduct such costs from any sum which has been held by the Vendor's solicitor as stakeholder for the Vendor;

Provided that the Purchaser shall at any time after the expiry of the said period of one month notify the Vendor of the cost of carrying out any works to make good the said defects, shrinkage or other faults before the commencement of the works
B and shall give the Vendor an opportunity to carry out the works himself within fourteen days from the date the Purchaser has notified the Vendor of his intention to carry out the said works.

C **[27]** The question that we have to determine is whether this cl 23 should be construed and applied against purchasers of houses. To do that it would be incumbent upon us to trace the purpose for which cl 23 was originally created. It began with the passing of the Housing Developers (Control and Licensing) Act 1966 and the regulations made thereunder. In 1982 the
D Housing Developers (Contract and Licensing) Regulations came into force. And reg 12(1) of Regulation 1982 provides that every contract of sale for the sale and purchase of a housing accommodation together with the sub-divisional portion of land appurtenant thereto shall be in the form as prescribed in Schedule E. Regulation 12(1) further provides that no
E amendment to any such contract of sale shall be made except on the ground of hardship or necessity and with the prior approval of the controller. In other words all the provisions in the sale and purchase agreement are actually statutory requirements which must be strictly complied with. Clause 23, in particular, is meant to be an additional protection for house buyers, without
F affecting or limiting their rights under the common law. This was the ruling made by the Privy Council in *City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd* [1988] 1 MLJ 69. In that case Lord Templeman said (at p 72):

G But the Act of 1966 and the Rules were designed to improve and supplement common law remedies and do not expressly or by implication deprive a litigant of a contractual remedy which is not dealt with under the Rules.

H **[28]** In the Federal Court case of *Teh Khem On & Anor v Yeoh & Wu Development Sdn Bhd & Ors* [1995] 2 MLJ 663, Peh Swee Chin FCJ said (at p 671):

Again, the vendor/builder and in fact, other defendants, all have joined in a common submission by way of defence that the damage occurred after the defect liability period mentioned in cl 23 of P1.

I I share the view espoused by Lord Denning in *Hancock & Ors v Bul Brazier Ltd* [1966] 2 All ER 901; [1966] 1 WLR 1317, to the effect that such clause similar to cl 23 in our instant appeal about making good structural defects discovered within six months would not take away the right to sue in respect of such defects which were not discoverable with such six months, and that further in regard those

defects discovered within the six months, the provision of an express remedy of making good the same defects will not ipso facto take away the rights of any purchaser which normally follow at common law in the case of a breach of contract. It is pertinent to mention that our cl 23 provides for 12 months instead of six months. The same principles would apply. Thus the said line of defence also fails

[29] On the basis of the ruling made by the above two cases the reliance of the defect liability period as a defence by the defendant should be totally rejected. Here again the learned judge had misdirected himself in law.

[30] In the light of the circumstances mentioned above we allowed the appeal by the plaintiffs with costs here and the court below. We also ordered that the damages accrued to each of the plaintiffs' be assessed by the senior assistant registrar.

Appeal allowed with costs.

Reported by Andrew Christopher Simon